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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Instruments by Precision Ltd., Inc.

File: B-235339

Date: August 14, 1989

DIGEST

Protest that firm who was proposed for debarment at time of bid opening but not at time of award should have received award is denied even though ineligibility status was subsequently terminated rather than expired. Agencies do not have discretion to make award where firm is ineligible, debarred or suspended at time of bid opening unless the Secretary of the military department concerned finds a compelling reason to waive the firm's ineligibility.

DECISION

Instruments by Precision Ltd., Inc., protests the rejection of its bid under invitation for bids (IFB) No. DLA-120-89-B-0469, issued by the Defense Logistics Agency (DLA) for surgical knife blades. Precision argues that DLA improperly determined that the firm, which had been proposed for debarment prior to and at the time of bid opening, was ineligible for award.

We deny the protest.

Bid opening was on March 8, 1989, and Precision submitted the low bid. However, at the time of bid opening, the firm was ineligible for award pending the outcome of formal debarment proceedings initiated on December 7, 1988.^{1/}

^{1/} If, as here, debarment of a firm is proposed by a military department, bids may not be solicited from and contracts may not be awarded to the firm pending a debarment decision unless the Secretary concerned finds a "compelling reason" to do so. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 209.406 (S-70) (1988 ed.); Federal Acquisition Regulation (FAR) § 9.406-3(c)(7) (FAC 84-43). The agency made no such finding.

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Subsequent to the time of bid opening, but prior to the award of a contract under the solicitation, Precision entered into an administrative settlement agreement with DLA. That administrative settlement arose out of a United States Claims Court action commenced by Precision in which the firm requested temporary and permanent injunctive relief against DLA's proposed debarment action. The settlement agreement, dated March 21, 1989, stated that DLA would terminate its debarment proceeding against Precision provided the firm met various conditions regarding the firm's ownership and responsibility and provided it moved to have its Claims Court action dismissed with prejudice (which apparently occurred promptly after execution of the settlement agreement). Subsequently, the agency rejected Precision's bid under this solicitation because the firm had been ineligible for award at the time of bid opening. This protest followed.

Precision argues that it was improper for DLA to reject its bid because the firm was not proposed for debarment at the time of award. Specifically, Precision argues that FAR § 14.404-2(g) (FAC 84-5) (which requires rejection of a bid from an ineligible firm "if the ineligibility has not expired as of the bid opening date") was not intended to preclude the awarding of a contract to a firm where the debarment action is "terminated as a result of . . . court action" since the rationale of the FAR provision is to prevent an agency from delaying an award until a firm's ineligibility status naturally expires which is not the case here.^{2/}

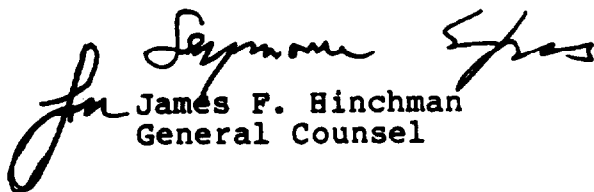
^{2/} Precision also argues that, in any event, it is entitled to award because DLA did not have reasonable grounds upon which to base its proposal for debarment. We merely note that this was part of the issues raised in the court proceedings in which Precision's suit was dismissed with prejudice. A dismissal with prejudice by a court, even if a result of a voluntary settlement, generally constitutes a final adjudication on the merits and bars further action by this Office. See C.P.F. Underground Utility, Inc., et al., B-209940.6, July 28, 1983, 83-2 CPD ¶ 135. In its suit, Precision identified five DLA solicitations under which it was adversely affected by the proposed debarment. Precision could have, but did not, amend its complaint to include the current solicitation although it knew at the time that under the terms of the proposed debarment it could not bid. Under the circumstances, we will not consider the matter further.

In response, DLA argues that both the FAR provision and our decisions preclude the exercise of any discretion on the part of the contracting officer where a firm is ineligible, suspended or debarred at the time of bid opening.

As to the issue of whether an agency may make award to a firm who is ineligible, suspended or debarred at the time of bid opening, the FAR mandates the rejection of such a firm's bid and does not provide the contracting agency with discretion to do otherwise, see Southern Dredging Co., Inc., 66 Comp. Gen. 300 (1987), 87-1 CPD ¶ 245; J.M. Cashman, Inc., B-225558, Apr. 15, 1987, 87-1 CPD ¶ 411, unless the Secretary concerned finds a "compelling reason" to waive the firm's ineligibility. This is so even where a firm's ineligibility is terminated (lifted) rather than expired. See Ben M. White Co., B-230033, May 19, 1988, 88-1 CPD ¶ 476.

As stated above, Precision argues that the rationale of FAR § 14.404-2(g) is to preclude an agency from delaying an award until a period of ineligibility expires as opposed to termination of the ineligibility by court action, citing Southern Dredging Co., Inc., 66 Comp. Gen. 300, supra. In that case, the protester submitted a "spreadsheet" reportedly used by those who drafted this FAR provision indicating that the reason for specifying the date of bid opening was to preclude such agency delay. Even so, we think that the rationale in cases involving the expiration of a proposed debarment or suspension of a firm is equally applicable to cases in which such proposed debarment or suspension is terminated; an agency could still delay award until proceedings against a preferred, albeit ineligible, bidder have been terminated. Indeed, we think this rationale is all the more compelling where an agency has the opportunity to take an affirmative role in lifting a firm's ineligibility status. We are, therefore, unpersuaded by Precision's argument.

The protest is denied.


James F. Hinchman
General Counsel